STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 8, 2010
v	No. 288216 Wayne Circuit Court
EDWARD ARTHUR HART, Defendant-Appellant.	LC No. 07-007134-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, this Court should not apply the law of the case doctrine in the context of the constitutional question and facts raised by defendant. Furthermore, I would find that the trial court properly suppressed the computer and related evidence the police seized from 28157 South Clement in Livonia on August 14, 2006.

I. Facts and Underlying Proceedings

On June 21, 2006, the Wayne Circuit Court entered a default judgment of divorce against defendant. At an evidentiary hearing to address defendant's motion to suppress the evidence seized by Livonia police in this case, Robbin Hill, defendant's former spouse, testified that defendant continued to inhabit the marital residence for two weeks after the divorce. Defendant claimed at the hearing that he lived in the marital residence until August 12, 2006. The hearing testimony agreed that personal property belonging to defendant remained in the marital home after defendant departed, and that defendant's property included a computer and a number of CD-ROMs and other computer media.

Hill recounted that on August 12, 2006, defendant "came to get his things and a domestic violence … occurred."[1] In response to a call from Hill, the Livonia police arrested defendant and placed him in jail. The next day, Hill telephoned the Livonia police to inform them that she had seen images of naked, "[v]ery young girls" on defendant's computer. On August 14, 2006, the

[1] Hill elaborated, "He called first. Came in, said he was coming to get his property. Came into the house. Sat down at his computer desk and chair. And I told him to get his things and get out of the house. And that's when the domestic violence happened."

police arrived at Hill's home and she invited them inside. Hill then directed an officer to her computer, which she and the officer used to view images stored on a "disk." Hill recalled in this regard as follows:

Q. Okay. Now, when you say disk—

A. —CD.

Q. CD Roms [sic]?

A. Yes.

Q. And who did those CD Roms [sic] belong to?

A. Mr. Hart.

Q. And where were they located?

A. On the top of his desk.

* * *

Q. Do you have a computer that's separate from the computer that was Edward Hart's?

A. Yes.

Q. There was more than one computer in that room?

A. Yes.

Q. How many computers were in there?

A. Two.

Q. And one belonged to you?

A. Yes.

Q. And one belonged to Edward Hart?

A. Yes.

Hill admitted that she did not consider defendant's computer or his CD-ROMs and other computer media to be joint personal property.

Q. . . . [T]hese items belonged to Mr. Hart. They didn't belong to you, correct?

A. Correct.

Q. And these were items that he either purchased or kept, or maintained as his own property?

A. Yes.

Livonia Police Officer Brian Duffany testified at the hearing that when he arrived at Hill's residence, she told him that "she had evidence of child pornography in her home," and that "there was property that was in her home that she no longer wished to be there[.]" Hill also advised Duffany that the police had arrested her former husband the previous day, which Duffany confirmed with a police dispatcher. Duffany then used Hill's computer to view images on a CD-ROM. After watching "one [video] clip," Duffany called dispatch and a police sergeant came to the scene. Duffany recalled, "[I]t was decided that I would confiscate all the disk[s] and computer equipment."[2] With respect to the police decision to seize defendant's computer and computer media, Duffany explained that Hill had shown him "some paperwork from a ruling back in June," and told him that defendant was "supposed to have all the stuff out of here. So my understanding originally i[t] was his and now basically it was left at the house and she no longer wanted it." Duffany conceded his awareness that defendant had been released from jail on a "conditional bond" that permitted him to retrieve his property from the house, "in the presence of a police officer."

Several days after Duffany seized defendant's computer and computer media, Livonia Detective Wade Higgason requested that Hill sign a consent form permitting his search of the previously seized computer and computer media that belonged to defendant. On September 12, 2006, Higgason obtained a search warrant because, "[u]pon reviewing the report and looking over the consent stuff, I was not comfortable with doing an exam on the computer without a search warrant." Higgason ultimately concluded that defendant's property "had been abandoned at the house," given that "it was intentionally left it [sic] there."

After the evidentiary hearing, the trial court rendered a bench opinion granting defendant's motion to suppress. The trial court found, in pertinent part:

> It is clear to this Court defendant has continuously claimed the personal property as his own private property and Hill also treated this as defendant's own personal property. . . . The day that the computer was seized, defendant and his brother, after the defendant being released from jail … came with a truck to remove his property. He never stated or acted as if he had ever abandoned this property. . . .

The trial court ordered suppression of the evidence obtained through the police seizure and search of defendant's computer and computer media, finding that defendant had a reasonable expectation of privacy in these items, that he had not abandoned the property, and that no exception to the warrant requirement justified the seizure and search.

[2] Duffany did not confiscate the other computers present in the marital home that belonged to Hill and her son.

The prosecutor filed an interlocutory application for leave to appeal. This Court peremptorily reversed the trial court:

> In lieu of granting the application, the Court, pursuant to MCR 7.205(D)(2), hereby REVERSES the September 20, 2007 order granting defendant's motion to suppress. Even assuming, without deciding that Hill did not have common authority over the searched items such that she could consent to the search, the warrantless search was nonetheless valid because the police officers reasonably believed that Hill had authority over the items. *People v Goforth*, 222 Mich App 306, 312; 564 NW2d 526 (1997), citing *Illinois v Rodriguez*, 497 US 177, 188-189; 110 S Ct 2793; 111 L Ed 2d 148 (1990). It is undisputed that the officers on the scene were informed by Hill that defendant abandoned the items at the house, and that they were shown a Judgment of Divorce reflecting that was likely the case. This evidence supported the officer's reasonable belief, and there was an absence of further evidence which would require additional inquiry by the officers. *Goforth*, *supra.* [*People v Hart*, unpublished order of the Court of Appeals, entered January 24, 2008 (Docket No. 281813).]

A jury later convicted defendant of two counts of making or producing child sexually abusive material, MCL 750.145c(2), and a count of using a computer to commit possession of child sexually abusive material, MCL 752.797(3)(d). On appeal, defendant asserts only that the seizure of his computer and computer media violated the Fourth Amendment.

II. Law of the Case Doctrine

The majority holds, "The law of the case doctrine applies. This Court explicitly ruled on the validity of the search and seizure of the evidence and reversed the trial court's order suppressing the evidence." *Ante* at 2. Because this case involves "whether (a) constitutional standard has been satisfied," "the law of the case doctrine must yield" to permit this Court to independently consider the factual record in full. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109-110, n 14; 476 NW2d 112 (1991), quoting *Harte-Hanks Communications, Inc v Connaughton*, 491 US 657, 688; 109 S Ct 2678; 105 L Ed 2d 562 (1989). "Particularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice. . . . At least one panel has stated that the law of the case need not be applied where the prior opinion was clearly erroneous." *People v Phillips (After Second Remand)*, 227 Mich App 28, 33-34; 575 NW2d 784 (1997) (citations omitted).

III. Merits of Defendant's Constitutional Argument

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." US Const, Am 4. Generally, "seizures of personal property are 'unreasonable within the meaning of the Fourth Amendment,' without more, 'unless ... accomplished pursuant to a judicial warrant,' issued by a neutral magistrate after finding probable cause." *Illinois v McArthur*, 531 US 326, 330; 121 S Ct 946; 148 L Ed 2d 838 (2001), quoting *United States v Place*, 462 US 696, 701; 103 S Ct 2637; 77 L Ed 2d 110 (1983). One "jealously and carefully drawn" exception to the warrant requirement "recognizes the validity of searches with the voluntary consent of an individual

possessing authority." *Georgia v Randolph*, 547 US 103, 109; 126 S Ct 1515; 164 L Ed 2d 208 (2006).

> . . . [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. [*United States v Matlock*, 415 US 164, 171; 94 S Ct 988; 39 L Ed 2d 242 (1974).]

"Common authority is, of course, not to be implied from the mere property interest a third party has in the property." *Id*. at 171 n 7. Rather,

> [t]he authority which justifies the third-party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one their number might permit the common area to be searched. [*Id*.]

The prosecution bears the burden of establishing common authority. *Rodriguez*, 497 US at 181.

An exception to the warrant requirement also extends to searches conducted "with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant." *Randolph*, 547 US at 109.

> As with other factual determinations bearing upon search and seizure, determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises? … If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. [*Rodriguez*, 497 US at 188-189 (internal quotation omitted).]

Many federal circuit courts of appeal have expressly recognized a police officer's duty to investigate when presented with ambiguous facts concerning an individual's authority to consent to a search. In *United States v Waller*, 426 F3d 838, 847, 849 (CA 6, 2005), the Sixth Circuit relied in part on abundant federal case law to conclude that "the circumstances presented here were sufficiently ambiguous to place a reasonable officer on notice of his obligation to make further inquiry prior to conducting a search of the luggage," and to hold "that the officers' warrantless entry into Waller's luggage without further inquiry was unlawful under the Fourth Amendment." In Professor LaFave's search and seizure treatise, he echoes the principles embodied in the Sixth Circuit's holding in *Waller*: "[S]ometimes the facts known by the police cry out for further inquiry, and when this is the case it is not reasonable for the police to proceed on the theory that 'ignorance is bliss.'" 4 LaFave, Search & Seizure (4th ed), § 8.3(g), p 180.

In this case, the record evidence conclusively establishes that Hill lacked actual authority to consent to a search of defendant's computer or his computer media. Hill acknowledged that

the computer and computer media belonged to defendant, and she consistently referred to the computer and computer media as his, rather than hers. As one example, Hill declared, "I had called and let the Police Department know of what I had visually seen on *his* computer." (Emphasis added). Throughout Hill's evidentiary hearing testimony, she vigorously *disclaimed* ownership of the computer and the nearby computer media. Consistently with Hill's characterizations of defendant's computer and computer media at the evidentiary hearing, Hill asserted at trial that "only Mr. Hart" used the computer "that belonged to Mr. Hart," and that defendant's computer was "password-protected." Duffany similarly recounted at both the evidentiary hearing and trial that Hill had advised him that the computer and computer media belonged to defendant. Because the police lacked any evidence that Hill and defendant mutually shared the seized computer and computer media or enjoyed joint access to this equipment, they unreasonably concluded that Hill's authority to consent authorized or encompassed their seizure of defendant's property.

In this Court's peremptory order reversing the trial court's suppression of the computer and related evidence, the Court held that because Hill told the police that defendant had "abandoned the items at the house" and had "shown [the police] a Judgment of Divorce," the officers "reasonably believed that Hill had authority over the items." I respectfully disagree that the police could have reasonably concluded that defendant abandoned his computer and computer media, or that Hill had authority over these items.

Abandoned property is not subject to Fourth Amendment protection. *Abel v United States*, 362 US 217, 241; 80 S Ct 683; 4 L Ed 2d 668 (1960). "Abandonment is primarily a question of intent, and intent may be inferred from words spoken, acts done, and other objective facts." *United States v Colbert*, 474 F2d 174, 176. (CA 5, 1973). In determining whether someone has abandoned property, "[a]ll relevant circumstances existing at the time of the alleged abandonment should be considered." *Id*. "The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Id*.

Here, a police officer in Duffany's shoes could reasonably have concluded that the computer and computer media constituted abandoned property if the circumstances showed that defendant had deliberately relinquished his property and privacy interests in the computer and computer media. Duffany admitted his awareness that at the time of the police seizure defendant possessed a conditional bond authorizing him to retrieve his property from Hill's home. Duffany also knew that the police had arrested defend

ant at Hill's home a day or two before she called to report the pornography. With minimal inquiry, Duffany would have ascertained that defendant had been released from jail and intended to promptly retrieve his property. The evidence of defendant's efforts to protect and reclaim his property reflect his desire to maintain his possessory and privacy interests in the property, not to abandon the items.[3] And according to the evidentiary hearing testimony, Hill asserted only

[3] Hill acknowledged that she had previously moved the computer and computer media into her garage, but moved everything back into the house after defendant voiced concern that the items

(continued…)

defendant's abandonment as a basis for her authority over the items. In light of the entirety of the circumstances revealed in the record, I find patently unreasonable Duffany's conclusion that defendant had abandoned the property. Furthermore, no evidence suggests that the officers at the scene actually read the divorce judgment, and nothing in that judgment or the law proclaimed defendant's property abandoned if he neglected to retrieve it within a certain time frame.

At a minimum, the situation presented some ambiguity about Hill's authority to consent to a seizure of items that indisputably did not belong to her. Under the totality of the circumstances, I find it unreasonable for Duffany to have proceeded with a warrantless confiscation. Additional investigation would have revealed that defendant had neither "abandoned" his property nor relinquished his privacy interests in his computer and computer media, but to the contrary that he repeatedly sought to remove the items from Hill's home. Consequently, I believe that this Court's peremptory order was clearly erroneous and should not be afforded preclusive effect solely on the basis of a doctrine "designed for judicial convenience." *Phillips*, 227 Mich App at 34. Because Hill did not possess the authority to consent to the seizure and Duffany had no reasonable basis for believing that defendant had abandoned his computer and computer media, I would reverse.

/s/ Elizabeth L. Gleicher

(…continued)

would get wet in the garage.